Legal Update

July 11, 2014

Odor of *unburnt* marijuana alone does not provide probable cause to search a motor vehicle!

Commonwealth v. Overmyer, SJC No. SJC-11481 (2014):

Background: On May 19, 2012, Pittsfield police officers responded to the scene of a motor vehicle accident. Upon arrival police observed the defendant, Matthew Overmyer (hereinafter referred to as "Overmyer") sitting on the side of the road. Overmyer's vehicle had rear-ended another vehicle. As the officers approached Overmyer's vehicle, they noticed a strong odor of **unburnt** marijuana. When the officers asked Overmyer whether he had marijuana inside the vehicle, he gave the officers keys to the glove compartment and they recovered a "fat bag" of marijuana, which was "rather large." Once the "fat bag" was removed, the officers still smelled a strong odor of **unburnt** marijuana even though officers did not observe anything else indicating the presence of marijuana. The officers read Overmyer of his Miranda rights before asking him whether the vehicle contained additional marijuana. Overmyer eventually admitted that there was more marijuana in the vehicle. One of the officers searched the back seat of the vehicle and found "a backpack that contained two large freezer bags, with smaller, individually wrapped packages of marijuana." Overmyer was arrested but the officers did not administer field sobriety tests because there was no evidence that he was impaired while operating a motor vehicle. Two days after stopping Overmyer, an additional criminal complaint charging Overmyer with possession of marijuana with intent to distribute, G. L. c. 94C, § 32C (a), and commission of this offense within a school or park zone, G. L. c. 94C, § 32J was issued against him.

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.

Overmyer filed a motion to suppress and challenged whether the officers had probable cause to search the vehicle after they recovered the "fat bag." The motion judge denied the motion to suppress related to the "fat bag" and concluded that that the smell of ***unburnt*** marijuana justified the officers investigating whether there was marijuana inside the vehicle. However once the officers discovered the "fat bag," the motion judge found that "there were no other articulable facts to base a reasonable suspicion that the defendant was engaged in criminal activity, or that there were other drugs present, and suppressed the evidence recovered from the back seat of Overmyer's vehicle." The motion judge added that the defendant made "no suspicious gestures, and there were no other indicia of the sale or manufacturing of marijuana," to warrant a further search of the vehicle. The Commonwealth filed an interlocutory appeal and the SJC transferred the case on its own motion. The issue the SJC considered was whether the smell of **unburnt** marijuana alone gives police probable cause to search the vehicle.

Conclusion: The SJC concluded that police did not have probable cause to search Overmyer's vehicle on the odor **unburnt** marijuana alone, after the police had seized a 'fat bag' of marijuana from the glove compartment. Since this appeal did not address whether the seizure of a "fat bag" provided probable cause to search the vehicle, the SJC remanded the case related to that issue to District Court for additional findings.

1st Issue: Did police have probable cause to search Overmyer's vehicle under the automobile exception?

Under the automobile exception to the warrant requirement, a warrantless search of an automobile is constitutionally permissible if the Commonwealth proves that officers had probable cause to believe that there was contraband or specific evidence of a crime in the vehicle. See ***Commonwealth v. Daniel***, 464 Mass. 746, 750-751 (2013). The "'ultimate touchstone' of both the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights is reasonableness." ***Commonwealth v. Townsend,*** 453 Mass. 413, 425 (2009). Here the Commonwealth argues that the smell of marijuana and the recovery of the "fat bag" gave police probable cause to search the back seat of the defendant's vehicle, under the automobile exception to the warrant requirement. Unlike ***Cruz*** and ***Daniel,*** the facts in the underlying case involve the smell of **unburnt** marijuana rather than burnt marijuana. ***Commonwealth v. Cruz***, 459 Mass. App. Ct. 459 (2011). According to the Commonwealth, the difference in odors of marijuana coupled with the recovery of the "fat bag" is sufficient to search the vehicle. The SJC disagreed and emphasized that in 2008 ballot initiative and the ***Cruz*** case established that the odor of **burnt** marijuana alone no longer constitutes a specific fact suggesting criminality ***Commonwealth v. Cruz*** at 472-4. Because the odor alone does not constitute probable cause to believe that a vehicle contains a criminal amount of contraband or specific evidence of a crime, then searching a vehicle under the automobile exception is not valid. See ***Commonwealth v. Daniel,*** at 750-752. Furthermore, the motion judge found even though the odor involved **unburnt** marijuana, it still did not justify the officers' search of the back seat of the vehicle after the defendant surrendered the "fat bag" of marijuana from the glove compartment. The officer's belief that there was more to be found in the vehicle was merely a "hunch." There was no additional evidence to suggest that the marijuana in the "fat bag" did not itself account for the smell the officers perceived.

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2nd Issue: Does the discovery of a controlled substance give probable cause to search for additional contraband in the area?

The Commonwealth contends "that it is widely accepted that the discovery of some controlled substances gives probable cause to search for additional controlled substances in the vicinity," ***Commonwealth v. Skea***, 18 Mass. App. Ct. 685, 690. Despite the proposition established in ***Skea,*** the SJC found that since the 2008 ballot which reclassified possession of less than an ounce of marijuana as a civil violation, this is not applicable to marijuana. See ***Commonwealth v. Pacheco***, 464 Mass. 768, 771-772 (2013) (presence of less than one ounce of marijuana in vehicle did not give rise to probable cause to search it for additional marijuana); ***Commonwealth v. Jackson***, 464 Mass. 758, 766 (2013) (observation of defendant with marijuana cigarette did not give rise to probable cause to search person); ***Commonwealth v. Daniel***, supra at 751-752 (defendant's surrender of two small bags of marijuana totaling less than one ounce did not give rise to probable cause to search vehicle).

The SJC also addressed whether the strength of the odor implied that there could be a criminal amount of marijuana present. Since 2008, Massachusetts courts also "have recognized the dubious value of judgments about the occurrence of criminal activity based on the smell of burnt marijuana alone, given that such a smell points only to the presence of *some* marijuana, not necessarily a criminal amount." The SJC found that although the odor of **unburnt**, rather than burnt, marijuana could be more consistent with the presence of larger quantities, it does not follow that such an odor reliably predicts the presence of a criminal amount of the substance, that is, more than one ounce, as would be necessary to constitute probable cause." ***Commonwealth v. MacDonald,*** 459 Mass. 148, 150-153 (2011). The characterizations describing the strength of marijuana are subjective. "While it is possible that training may overcome the deficiencies related to smell as a gauge of the weight of marijuana present," there is no evidence that the officers in ***Overmyer*** had specialized training that would enable them to discern the presence of a controlled substance along with its weight. "In sum, we are not confident, at least on this record, that a human nose can discern reliably the presence of a criminal amount of marijuana, as distinct from an amount subject only to a civil fine. In the absence of reliability, 'a neutral magistrate would not issue a search warrant, and therefore a warrantless search is not justified based solely on the smell of marijuana,' whether burnt or unburnt. …" ***Commonwealth v. Daniel,*** supra at 751, citing ***Cruz***, supra at 475-476.

Commentary: In light of the holding in ***Daniel*** that was issued last year, the SJC decision in this case was not a surprise. Absent other factors, the odor of burnt or **unburnt** marijuana is insufficient to search a motor vehicle. This case differs from ***Fontaine***, where the officers applied for a search warrant after they detected an overwhelming odor of **unburnt** marijuana coupled with additional factors. Here the officers did not apply for a search warrant and there did not appear to be additional factors other than the odor of **unburnt** marijuana. One key point to remember is that the SJC did not determine whether the officers had probable cause to arrest the defendant for possession of the "fat bag," nor whether the officers had a reasonable belief that the "fat bag" contained more than one ounce of marijuana.

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